Laborers' District Council of Western Pennsylvania a/w Laborers' International Union of North America, AFL-CIO *and* Anjo Construction Co. and Fruin-Colon Contracting Company and Carpenters District Council of Western Pennsylvania, United Brotherhood of Carpenters and Joiners of America, Pile Drivers Local Union No. 2264, AFL-CIO

Laborers' International Union of North America, Laborers' District Council of Western Pennsylvania, and its Local Union No. 1058, AFL-CIO *and* Mergentime Corporation *and* Carpenters District Council of Western Pennsylvania, United Brotherhood of Carpenters and Joiners of America, Pile Drivers Local Union No. 2264, AFL-CIO. Cases 6-CD-752, 6-CD-754, and 6-CD-753

October 22, 1982

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Anjo Construction Co. (Anjo), Mergentime Corporation (Mergentime), and Fruin-Colnon Contracting Company (Fruin-Colnon), herein collectively called the Employers, alleging that Laborers' District Council of Western Pennsylvania, and its Local Union No. 1058, AFL-CIO, a/w Laborers International Union of North America, AFL-CIO, herein jointly called the Laborers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employers to assign certain work to its members rather than to employees represented by Carpenters District Council of Western Pennsylvania, United Brotherhood of Carpenters and Joiners of America, Pile Drivers Local Union No. 2264, AFL-CIO, herein called the Pile Drivers.

Pursuant to notice, a hearing was held before Hearing Officer Charles H. Saul on May 4, 24, and 25, 1982, and on June 3, 1982. The Employers, the Laborers, and the Pile Drivers appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employers, the Laborers, and the Pile Drivers filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYERS

The parties stipulated, and we find, that Anjo Construction Co., a Pennsylvania corporation with its principal office located in Pittsburgh, Pennsylvania, is engaged in the construction of a subway in Pittsburgh, Pennsylvania, under a contract by the Port Authority of Allegheny County. Since the commencement of these operations on or about September 30, 1981, until the date of the hearing, Employer Anjo purchased and received goods and materials from outside the Commonwealth of Pennsylvania valued in excess of $50,000. The parties stipulated, and we find, that Fruin-Colnon Contracting Company, a Missouri corporation with its principal office located in St. Louis, Missouri, is engaged in the construction of a subway in Pittsburgh, Pennsylvania, under a contract let by the Port Authority of Allegheny County. Since the commencement of these operations on or about October 1, 1981, until the date of the hearing, Employer Fruin-Colnon purchased and received goods and materials from outside the Commonwealth of Pennsylvania valued in excess of $50,000. Further, the parties stipulated, and we find, that Mergentime Corporation, a Delaware corporation with its principal office in Flemington, New Jersey, is engaged in the construction of a subway in Pittsburgh, Pennsylvania, under a contract let by the Port Authority of Allegheny County. Since the commencement of these operations, on or about November 1, 1981, until the date of the hearing, Mergentime Corporation purchased and received goods and materials from outside the Commonwealth of Pennsylvania valued in excess of $50,000. The parties stipulated, and we find, that each of the Employers is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that the Laborers' District Council of Western Pennsylvania affiliated with Laborers International Union of North America, AFL-CIO, and Laborers' International Union of North America, Laborers' District Council of Western Pennsylvania, and its Local Union No. 1058, AFL-CIO, and Carpenters District Council of Western Pennsylvania, United

Brotherhood of Carpenters and Joiners of America, Pile Drivers Local Union, No. 2264, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts*

In 1981, based on competitive bids, the Port Authority of Allegheny County (Port Authority) awarded the Employers separate contracts to perform construction work on the downtown Pittsburgh, Pennsylvania, subway projects, the first subway project in the Pittsburgh area.

Anjo Construction Co. contracted to construct a concrete shell for the Midtown portion of the Pittsburgh subway, which is located between Grant Street and Fifth Avenue, to the county jail wall, and to do some demolition work, backfilling, and rebuilding of streets. Anjo began work on the project in October 1981. In order to build the shell, Anjo must excavate some 35 to 40 feet below the street surface, and, to prevent the excavation from caving in, lagging, i.e., the horizontal placement of wooden slats between vertical piles, is required.

Mergentime corporation, managing sponsor of a joint venture with Morrison-Knudsen Associates, contracted to construct a subway box structure approximately 35 feet wide and 40 feet deep beginning at Liberty Avenue and Sixth Avenue and proceeding some 1,900 lineal feet along Liberty Avenue to the Gateway Center area. Mergentime began work on the project in mid-February 1982. The method of construction, which is used with a supportive excavation and decking system to maintain pedestrian and vehicular traffic, is known as "cut and cover." Lagging is necessary to prevent the structure from caving in.

Fruin-Colnon Contracting Company contracted to construct the Wood Street station shell between Liberty Avenue and Grant Street along Sixth Avenue. Fruin-Colnon began work on the project in January 1982. Lagging is necessary to provide access to the construction site as well as to stabilize the adjacent soil and prevent it from falling in.

The Employers, all of whom are members of the Constructors Association of Western Pennsylvania (Constructors Association), held separate prejob conferences at which representatives of both the Laborers and the Pile Drivers were present. Each Employer assigned the lagging work to employees represented by the Laborers. The Pile Drivers objected to the assignment, claiming the lagging operation, but not claiming the trimming or backfilling handwork necessary to complete lagging. However, no changes in the assignments were made. Subsequently, upon hearing a rumor that the Employers were considering reassigning the lagging work to employees represented by the Pile Drivers, on or about March 29, 1982, the president-business manager of the Laborers sent a letter to each Employer stating that if the work assignment were changed, the Laborers would strike and picket. In addition, on March 30, 1982, a representative of the Laborers advised Fruin-Colnon's project superintendent that if the disputed work were assigned to employees represented by the Pile Drivers, the Union would take whatever action was necessary to protect their jurisdiction.

B. *The Work in Dispute*

The work in dispute involves the unloading, hooking-on, signaling, handling, installation, and removal of lagging at the Port Authority of Allegheny County subway construction project in Pittsburgh, Pennsylvania.

C. *Contentions of the Parties*

The Employers contend that there is reasonable cause to believe that the Laborers has violated Section 8(b)(4)(D) of the Act, and that there is no agreed-upon method for the voluntary adjustment of the dispute. All the Employers contend that the work in dispute should be awarded to employees represented by the Laborers based on the factors of efficiency and economy of operations, employer preference and past practice, industry practice, and relative skill and safety. Fruin-Colnon and Mergentime further contend that the work in dispute should also be awarded to employees represented by the Laborers on the basis of area practice and the provisions of the applicable collective-bargaining contracts, and Fruin-Colnon also contends that the work in dispute should be awarded to the Laborers on the basis of private awards by national arbitral tribunals.

The Laborers position, as expressed in its brief, is in accord with that of the Employers. The Pile Drivers takes the position that its agreement with the Constructors Association, and the factor of area practice, favors an award of the disputed work to employees represented by it.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon method for the voluntary adjustment of the dispute. As noted above, it is uncontroverted that the Laborers demanded the disputed work and threatened to strike and picket in support of its demand. Based

on the foregoing and the record as a whole, we find that there is reasonable cause to believe that an object of its conduct was to force or require the assignment of the work in dispute to employees represented by it rather than to employees represented by the Pile Drivers, and that a violation of Section 8(b)(4)(D) has occurred.

No party contends, and the record discloses no evidence showing, that a agreed-upon method for the voluntary adjustment of this dispute exists to which all parties are bound. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[1] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[2]

The following factors are relevant in making the determination of the dispute before us:

1. Certification and collective-bargaining agreements

None of the Unions involved herein has been certified by the Board as the collective-bargaining representative for a unit of any of the Employers' employees. All of the Employers are members of the Constructors Association which has collective-bargaining agreements with both the Laborers and the Pile Drivers. An examination of the Pile Drivers agreement with the Constructors Association, on which the Pile Drivers, in part, bases its claim to the disputed work, provides in relevant part: "The placing, cutting, handling, and removal of all lagging pertaining to piling used in and for foundations, docks, and wharves shall be the work of the Pile Driver . . . ." The project herein is the building of a subway which, as amply supported by record evidence, does not involve a foundation.

An examination of the Laborers agreement with the Constructors Association discloses that the recognition of the Laborers extends to all employees in certain enumerated categories of work, including "sheeters and shorers." The record discloses that sheeting and shoring are related to lagging and that the words "sheeting" and "lagging" are used interchangeably in the Employers' contracts with the Port Authority. We find that the Laborers collective-bargaining agreement with the Constructors Association is sufficiently broad to include the work in dispute and, therefore, the factor of a collective-bargaining agreement favors an award of the disputed work to employees represented by the Laborers.

2. The Employers' past practice and preference

Anjo has never before been involved in the construction of a subway. However, in prior projects where sheeting and shoring were necessary, Anjo has utilized employees represented by the Laborers to do the work. Fruin-Colnon has undertaken 17 subway and tunnel projects since 1968. In each of these projects the lagging work was identical to the instant case and in each of these projects the lagging work was assigned to employees represented by the Laborers. Mergentime has worked on subway projects similar to the instant project in Atlanta, Philadelphia, Washington, D.C., and Boston. Morrison-Knudsen, Mergentime's partner, has in the instant project also been involved in similar subway projects in Washington, D.C., and San Francisco. In all of these projects, lagging, as in the instant project, was necessary and all of the lagging work was performed by laborers. Therefore, it appears that the disputed work has in the past been assigned to and performed by employees represented by the Laborers. While we do not afford controlling weight to this factor, we find that it tends to favor the award of the disputed work to employees represented by the Laborers.

3. Industry and area practice

The Employers and the Laborers presented undisputed testimony that the vast majority of lagging work for the construction of subway systems throughout the country has been performed by employees represented by the Laborers. The Laborers also presented testimony that the only decision of record from the National Joint Board and Impartial Jurisdictional Disputes Board indicates that lagging work is to be performed by employees represented by the Laborers. Accordingly, we find that the predominant industry practice favors an award of the disputed work to employees represented by the Laborers.

The only subway construction project in the area is the one here. Accordingly, the factor of area practice is not helpful to our determination.

4. Relative skills and safety considerations

The Employers presented undisputed testimony that the employers represented by the Laborers possess the requisite skill to perform the disputed

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[1] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[2] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

work. The Pile Drivers presented undisputed testimony that employees represented by it also possess the skills necessary to perform the work in dispute. We, therefore, find that the factor of relative skills is not determinative.

Anjo and Mergentime presented testimony that an award of the disputed work to employees represented by the Pile drivers would result in the presence of more employees in the confined area in which lagging work is performed. They further presented testimony that the disputed work is performed in areas into which heavy materials are constantly lowered and the increased number of employees would increase the likelihood of employee injuries. Accordingly, we find that the factor of safety considerations tends to favor an award of the disputed work to employees represented by the Laborers.

5. Economy and efficiency of operations

The Employers presented testimony that if pile drivers were awarded the disputed work it would still be necessary to employ their present complement of laborers to perform the trimming and backfilling of lagging, since such work was not claimed for employees represented by the Pile Drivers. The Employers further presented evidence that the assignment of the disputed work to laborers permits the installation of lagging and performance of the related and integral work of trimming and backfilling the lagging as a continuous operation. Since the Pile Drivers does not claim the latter work, an award of the work in dispute to employees represented by the Pile Drivers would result in two different crews performing related work, thereby leaving employees standing idle or occasioning delays in the completion of the lagging work. Also, the Pile Drivers agreement with the Constructors Association unlike the Laborers agreement requires a minimum crew size. Further, it is undisputed that the nature of the disputed work is unskilled and, while laborers are so classified, pile drivers are classified as skilled workers. Therefore, if employees represented by the Pile Drivers were awarded the disputed work it would result in hiring more employees and using skilled workers to perform unskilled work. Accordingly, we find that the factors of economy and efficiency of operations favor an award of the disputed work to employees represented by the Laborers.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that the employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion upon the facts that such assignment is consistent with the Constructors Associations' current collective-bargaining agreement with the Laborers; the employees represented by the Laborers possess the requisite skills to perform the disputed work and job safety is enhanced by an assignment of the disputed work to such employees; such assignment is consistent with predominant industry practice; such assignment will result in greater efficiency and economy of operations; and it is consistent with the Employers' preference. Accordingly, we shall determine the dispute before us by awarding the work in dispute to the employees represented by the Laborers.

In making this determination, we are assigning the disputed work to employees currently represented by Laborers' International Union of North America, Laborers' District Council of Western Pennsylvania, and its Local Union No. 1058, AFL–CIO, but not to those unions or their members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing factors and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

Employees of Anjo Construction Co., Fruin-Colnon Contracting Company, and Mergentime Corporation, who are currently represented by Laborers' International Union of North America, Laborers' District Council of Western Pennsylvania, and its Local Union No. 1058, AFL–CIO, are entitled to perform the unloading, hooking-on, signaling, handling, installation, and removal of lagging at the Port Authority of Allegheny County subway construction project in Pittsburgh, Pennsylvania.